such persons often exercise "the actual day to day control." Multiple Ownership NPRM, supra, 95 FCC 2d at 366, n.26; Amendment of Section 3.35, p. 32 supra.

Given the presumption of the broadcast attribution rules that any cognizable interest is a controlling interest, the Commission necessarily authorizes any cognizable owner to exercise actual working control of the licensee when it grants an application approving the qualifications of that person as a cognizable party. Indeed, that is proven by the Commission's decision in Metromedia, Inc., 98 FCC 2d 300 (1984), which held that an application of John Kluge to acquire *de jure* control of Metromedia (by moving from a minority ownership position to majority ownership) could be filed on a short form rather than a long form (as a petitioner had urged was required) because he already had *de facto* control of the licensee and thus there was no substantial change of control. The Commission stated:

> "[W]e find that Mr. Kluge, with his current stock interests and offices, has exercised *de facto* control of the company. Metromedia under the *de facto* control of Mr. Kluge has had its qualifications reviewed and found acceptable by the Commission in connection with our approval of numerous long form applications over the years.... [W]here a 'passed upon' individual is going from *de facto* control to *de jure* control, the use of the short form is appropriate because such transactions do not involve a substantial change of control." Id. at 306.

Significantly, the Commission did not find Kluge guilty of any *de facto* control violation for having long exercised actual working control while holding only a minority ownership interest. Instead, the Commission pointed out that Kluge's qualifications had been "passed upon." In other words, because Kluge was an approved cognizable owner, albeit with a minority holding, he was *permitted* to exercise actual working control.

From this it is clear that the HDO in the present case badly misapplied the Commission's *de facto* control policy by failing to recognize that the policy does not prohibit the exercise of actual

working control by the authorized holder of a cognizable interest. The HDO also seriously erred by failing to consider the meaning of the specific incentive embodied in the minority ownership exception. When the Commission adopted that exception and encouraged broadcasters to take cognizable interests to ensure the viability of their investments, it knew that such interests are *presumed* to be controlling. Benchmark NPRM, Attribution of Ownership Interests, supra. It confirmed that principle shortly after the exception was adopted. Minority Incentive Reexamination, supra. Here, NMTV's 1987 Odessa application named Paul Crouch as a party to the application -- the President and one of three Directors of NMTV -- and reported that he was also an officer of Trinity's 12 television stations. TBF Ex. 101, Tab Q, pp. 24, 33, 35. Supplementing the application was Colby May's letter to the Bureau enclosing NMTV's Bylaws, which spelled out the powers of NMTV's President (Crouch) as follows:

> "President. Subject to such supervisory powers as may be given by the Board of Directors to the chairman of the board, if any, *the president shall*, subject to the control of the Board of Directors, generally *supervise, direct, and control the business and the officers of the corporation*. The president shall have the power to select and remove all agents and employees of the corporation...." TBF Ex. 101, Tab I, p. 14 (emphasis added).

Thus, in granting NMTV's application, the Commission not only passed upon Paul Crouch as a cognizable officer and director of the applicant, which carried a presumption that he would have working control, but did so with the knowledge that he was empowered by the corporate Bylaws to "supervise, direct, and control" the conduct of NMTV's business, subject to the ultimate control of the Board. The LPTV applications filed by NMTV likewise identified Crouch's cognizable position of President and Director. TBF Ex. 101, pp. 25-26, Tab L, p. 7, Tab M p. 7.[19]

[19] Indeed, Crouch's position as one of three directors was equivalent to a 33 1/3% voting (continued...)

In short, the Commission *authorized* Paul Crouch to exercise actual working control of NMTV when it permitted him to hold the cognizable positions of President and Director. Metromedia, Multiple Ownership NPRM, Amendment of Section 3.35, supra. And even if that alone were not enough to grant the authority, there can be no doubt that such authority was conferred when the Commission granted NMTV's application after seeing Bylaws that expressly empowered the President (Crouch) to "supervise, direct, and control" the operation of the business.

The HDO thus plainly erred in concluding that if Paul Crouch exercised actual working control of NMTV (which the record shows he did not), he did so unlawfully. Contrary to that premise, Crouch was fully authorized as an approved cognizable officer and director to exercise working control of NMTV had he undertaken to do so. That is a compelling independent reason why designation of the *de facto* control and abuse of process issues in this case was improvident.

F. The HDO Is Based on Completely Inapposite Cases

The HDO not only paid no attention to the origins and substance of the specific minority ownership and cognizable interest policies at issue, it relied on cases that have no bearing on those policies. Indeed, nearly every case on which the HDO relied involved no minority ownership policy at all, let alone a policy that Trinity allegedly had abused. Many of the cited cases long pre-dated the applicable policies. Others post-dated the filing of NMTV's applications and therefore gave Trinity no notice of regulatory requirements. Moreover, some cited cases merely asserted that the Commission has a *de facto* control policy -- an unremarkable proposition that totally begs the question of whether the *de facto* control policy applied to the minority LPTV lottery preference and

---

[19](...continued)
ownership interest in the nonstock corporation, far above the adopted benchmark of 5% that is subject to a presumption that the interest held is "controlling." Benchmark NPRM, p. 41 supra.

minority ownership exception. While the HDO summarily declared that the *de facto* control policy did apply, the Bureau's own analysis of the minority LPTV lottery preference shows that this was arbitrary and wrong. *See* pp.27-29 supra. A similarly reasoned analysis of the minority ownership exception compels the same conclusion. *See* pp. 30-40 supra.[20]

The HDO overlooked the relevant questions even when it cited Metro Broadcasting, Inc. v. FCC, 497 US 547 (1990), a decision that did involve minority ownership policies (HDO ¶14). While Metro held that Congress and the Commission adopted minority ownership policies as a means to expand program diversity, the case involved neither of the minority policies at issue here (the minority LPTV lottery preference and the minority ownership exception). Metro did not hold that *de facto* control by minorities was required under those policies or was necessary to achieve program diversity. To the contrary, making the point that Congress and the Commission had found a nexus between minority ownership *per se* and program diversity, Metro cited the Congressional mandate behind the minority LPTV lottery preference. Specifically, the Court noted Congress' announced objective of "increasing the number of media outlets owned" by minorities, the "unmistakable" reaffirmation of that intention in the second lottery statute, and Congress' explanation that the

[20] In its apparent haste, the Commission failed to perceive that it was citing cases in the HDO that not only were irrelevant but actually contradicted the action being taken against Trinity. For example, in The Trustees of the University of Pennsylvania Radio Station WXPN(FM), 69 FCC 2d 1394 (1978), the Commission imposed sanctions because the licensee's approved cognizable owners had *abdicated* control in the face of specific complaints of station misconduct. The present case is precisely the opposite: here an approved cognizable owner is charged with *exercising* control of a licensee that has received no such complaints. In Arnold L. Chase, 5 FCC Rcd 1642 (1990), the Commission designated a hearing because control was allegedly exercised by a person whom the licensee had not disclosed in its application and who had not been passed on by the Commission -- unlike Paul Crouch, whose cognizable position as the President of NMTV with explicit authority under the Bylaws to "direct, supervise, and control" the company's day-to-day operation was clearly and openly shown in NMTV's applications.

minority lottery preference was designed "'to promote the diversification of media ownership and consequent diversification of programming content.'" Id. at 576. "With this new mandate from Congress," said the Court, "the Commission adopted rules to govern the use of a lottery system to award licenses for low power television stations." Id. Those rules, of course, granted a preference for minority ownership *per se*, including ownership that was totally *passive*. *See* pp. 18-30 supra.

The Commission's own position in the Metro litigation recognized that operating control by minorities was not a prerequisite to achieving the diversity goals of minority ownership policies. Briefing the case to the Supreme Court, the Commission defended the minority policies at issue (distress sales and comparative hearing preferences) by relying on the minority LPTV lottery preference and Congress' goal to increase diversity through ownership rules rather than by imposing specific operating requirements on stations case-by-case.[21] Noting that Congress enacted the lottery preference to remedy "past economic disadvantage to minorities" and promote "greater diversification of the media," the Commission cited Congress' findings that such "*ownership* preferences [are] 'an important factor in diversifying the media of mass communications'" and that "'[t]he underlying policy objective of these preferences is to promote the diversification of media *ownership* and consequent diversification of program content.'" **Tab 13**, pp. 13, 19 (emphasis added). The Commission's brief expressly recognized that Congress made those findings in enacting a minority lottery preference that could be claimed *whether or not* the minority owners had working control.[22]

---

[21] Brief for Federal Communications Commission in Supreme Court Case No. 89-700, filed February 1990 (**Tab 13**).

[22] As indicated, the premise of the preference was that increased beneficial ownership by minorities would remedy past economic disadvantage and inevitably translate into program diversity. *See also* p. 22, n. 12 supra. When the minority lottery and multiple ownership incentives were (continued...)

In short, in citing Metro for the proposition that Congress and the Commission adopted minority ownership policies as a means to achieve program diversity (8 FCC Rcd at 2477), the HDO once more ignored the key question -- whether eligibility for the minority preferences at issue here depended on *de facto* control being exercised by minorities. On that question Metro leads to just one conclusion: by its heavy reliance on the lottery statute, the Commission's lottery rules, and the beneficial ownership standard as a valid means to promote program diversity, Metro reaffirms that *de facto* control considerations did *not* apply.

The HDO also begged the relevant question in its sole reference to the Second Ownership Order that adopted the minority ownership exception (p. 35 supra). Following is the HDO's entire two-sentence treatment of the Second Ownership Order:

> "Furthermore, Section 73.3555 (e)(3)(iii) of the Commission's Rules states that for purposes of this rule, 'minority controlled' means more than 50 percent owned by one or more members of a minority group. As the Commission stated when it adopted its multiple ownership rules, it 'permit[s] group owners of television and radio stations to utilize a maximum numerical cap of 14 stations provided that at least two of the stations in which they hold cognizable interests are minority controlled.'" 8 FCC Rcd at 2477 (¶16) (citation omitted).

This assertion, which merely paraphrased the rule, again ignored the crucial issue -- whether the special definition of "minority-controlled" incorporated the concept of *de facto* control. With one more logical sentence the Commission could have spoken to that point:

> "*And since 'minority controlled' means 'more than 50 percent owned' by minorities, the minority exception raises the cap for group owners to 14 stations if at least two of the stations are* ***more than 50 percent owned*** *by minorities.*"

---

[22](...continued)
adopted, the thrust was to increase minority beneficial ownership as much and as soon as possible with the goal that programming diversity would follow.

Had the Commission so stated, the HDO would have been articulating in plain English the beneficial ownership standard of the minority LPTV lottery preference, which excludes consideration of *de facto* control. *See* pp. 18-30 supra.

Moreover, in repeating the special definition of "minority-controlled" in Section 73.3555-(e)(3)(iii), the HDO totally overlooked the obvious meaning and natural construction of the quoted language. As the HDO asserted, Section 73.3555(e)(3)(iii) reads quite simply:

> "Minority-controlled *means* more than 50 percent owned by one or more members of a minority group." (Emphasis added.)

In a statutory definition, the word "means" has key significance. As a general principle of statutory construction, "a definition that declares what a term 'means' . . . excludes any meaning that is not stated." Colautti v. Franklin, 439 U.S. 379, 392 n. 10 (1979); National Wildlife Federation v. Gorsuch, 693 F.2d 156, 172 (D.C. Cir 1982); Statutes and Statutory Construction (Sutherland, 5th Ed. 1992) at §47.07. Hence, the definition of "minority-controlled" is limited to what Section 73.3555(e)(3)(iii) in plain English says the term *means*: "more than 50 percent owned" by minorities, nothing else. Designation of the *de facto* control issue against Trinity was irreconcilable with the only permissible definition of "minority-controlled" under this basic rule of statutory construction. The HDO failed to see and did not address that fundamental point.

Finally, it is most significant that the HDO did not cite Note 1 as authority for the claim that operating control by minorities was required under the minority ownership exception. The ALJ, the Bureau, and Trinity's opponents all find it obvious that Note 1 applied -- so obvious that the Bureau calls "incredible" the notion that Colby May missed it. But the Bureau does not explain why, if Note 1 so obviously applied, the Commission *itself* said nothing about Note 1 in the HDO, nothing about

Note 1 in the 1984 Second Ownership Order adopting the minority ownership exception and defining "minority-controlled" (*see* p. 35 and n. 17 supra), and nothing about Note 1 in 1985 when stating that the minority ownership exception was based on equity ownership alone (*see* p. 10 supra). Nor has anyone explained why Commissioner Patrick saw no relevance to Note 1, why Chairman Fowler saw none, why The Washington Post Company and Covington & Burling saw none when they construed the minority ownership exception to allow group owners to "control" 14 stations (*see* p. 39 supra), and why the Bureau saw none when Alan Glasser voiced concern about the relationship between Trinity and NMTV.

There was a good reason for deeming the Note 1 definition of "control" irrelevant to the special definition of "minority-controlled" adopted for the minority ownership exception. The two definitions have distinctly different purposes. Note 1 defines the *kinds of interests* to which the ownership limit applies. The special definition of "minority-controlled" defines criteria that *expand the ownership limit*. This reflects the basic difference between the general purpose of the attribution rules and the purpose of the minority ownership exception, which the Commission noted in Minority Incentive Reexamination, supra: whereas the purpose of the attribution rules was not to promote minority ownership but "to establish a regulatory line of demarcation" between attributable and nonattributable interests (**Tab 4**, p. 4, ¶9), the purpose of the minority ownership exception was "to foster investment in minority-controlled broadcasting companies" (**Tab 4**, p. 2, ¶3). It is well settled that where similarly worded sections of the same statute have different purposes, they need not be read to have the same meaning. Common Cause v. Federal Election Commission, 842 F.2d 436, 442

(D.C. Cir. 1988) (construing word "name" in §(e)(4) as having different meaning from word "name" in §(e)(5) because of "the different purposes served by each section").[23]

In sum, the HDO provided no reasoned analysis of the minority policies under which Trinity was proceeding, erroneously relied on cases having nothing to do with those policies, ignored the only interpretation of its own rule that is consistent with established standards of statutory construction, and stated no tenable ground for designating issues against Trinity.

III. THIS CASE IS IRRECONCILABLE WITH FOX AND SPEER

The Commission's treatment of Trinity in this case thus far cannot be reconciled with the decisions in Fox and Speer, supra. Despite finding that Fox in 1985 had acquired control of six television stations in violation of Section 310 alien ownership restrictions, the Commission forgave Fox's misinterpretation of the law and absolved Fox of intentional concealment because the law at the time had not been entirely clear from the agency's published rulings. 10 FCC Rcd at 8456. Indeed, the Commission even spared Fox a hearing on the matter. Recognizing that designation for hearing would be unwarranted if there were no evidence of intent to deceive, the Commission took statements from its staff (including Alan Glasser) to ascertain what disclosures Fox had made. Even though it found that Fox had failed to disclose all relevant information (id., 8483-85, 8494) and that the legal theory of Fox's counsel was "somewhat remarkable" (id., 8500), the Commission concluded that the

---

[23] Under Note 1, a party may not "control" (through "majority stock ownership" or "actual working control") more than the number of stations permitted under the rule. For the minority exception, this meant that Paul Crouch could not have majority stock ownership or actual working control of "[m]ore than 14 television stations" (47 CFR §73.3555(e)(1)(ii)), two of which had to be "minority-controlled," that is, "more than 50 percent owned by one or more members of a minority group" (47 CFR §§73.3555(e)(1)(iii) and (3)(iii)). Simply put, since NMTV was minority-controlled under that definition, Note 1 *authorized* Crouch to exercise (and in no way restricted him from exercising) "actual working control" over NMTV had he done so. That, of course, is exactly what the Commission means when it allows someone to hold a cognizable interest. *See* pp. 40-44 supra.

evidence was "overwhelmingly inconsistent" with a finding of intent to deceive (id., 8492) because the law was not entirely clear (id., 8486-89) and because Fox had shown a willingness to talk to the staff (id., 8490-91).

In *Trinity's* case, however -- where the Commission likewise had no evidence of intent to deceive, where Trinity's counsel (like Fox's counsel) had talked to the staff, where NMTV had furnished Bylaws that explicitly empowered Paul Crouch to "supervise, direct, and control" NMTV's business operation subject to Board control, where Trinity and NMTV had made many additional disclosures that were inconsistent with an intent to conceal, and where the law *supported* Trinity's position (or, if it did not, then was hopelessly unclear) -- the Commission designated a hearing. Moreover, it did so without even talking to the key staff member involved. In short, Trinity has been judged by a far different standard. Every factual and legal ground on which the Commission absolved Fox applies equally or even more strongly to Trinity.

The Mass Media Bureau has sought to distinguish Fox on the ground that whereas in Fox the law "was not settled at the time," here the law was clearly stated in Note 1 to §73.3555. MMB Reply, pp. 17-18. But if anything was clear from all that Congress and the Commission had said about the minority ownership exception, it was that the minority ownership exception was an *exception* to Note 1 as well. If that is not clear to the Bureau now, the Glasser affidavit shows that it was quite clear to the Bureau in 1987. And at the very least, the manifest discrepancy between the Bureau's position in 1987 and its position today establishes that the law at the time was *not* settled.

Moreover, the Bureau misapprehends the standard applied in Fox. The licensee was absolved of intentional concealment in Fox not because the law there was "not settled," but more specifically because "our reported cases would not *necessarily* have led a reasonable applicant" to realize what

the law was. Fox Reconsideration, supra, 3 CR at 527-28 (¶3) (emphasis added). It is not enough that the published legal authority "supports" an interpretation different from the licensee's. The test is whether the published authorities "compel" such an interpretation. Id. at 532 (¶31). Thus, the issue in this case is whether published authorities in 1987 would "necessarily" have led a reasonable applicant to realize that Note 1 overrode the special definition of "minority-controlled" in §73.3555(e)(3)(iii). Given all of the authorities reviewed above -- the extensive legislative history, the Commission's pronouncements on the beneficial ownership standard, Commissioner Patrick's explicit and undisputed interpretation of the rule as endorsed by Chairman Fowler, the stated rationale of the minority ownership exception, the plain definitional language of §73.3555(e)(3)(iii), and the absence of any Commission reference to Note 1 in connection with the minority ownership exception -- the Commission cannot possibly now hold that a reasonable applicant in 1987 would "necessarily" have concluded that Note 1 applied. All of the authorities pointed to exactly the *opposite* conclusion. In short, Fox cannot be distinguished.[24]

On the issue of intent, the present case is also irreconcilable with Speer, in which the Commission, again finding no evidence of intent to deceive, neither designated a hearing nor saw any reason to disqualify Silver King despite finding that Silver King without authorization assumed *de*

---

[24] Indeed, Fox's "somewhat remarkable" legal interpretation -- that under Section 310 aliens could own 99% of the equity in a licensee -- was unprecedented and far more novel and bizarre than Colby May's interpretation of the minority ownership exception here. May's interpretation was neither unprecedented nor bizarre. It was identical to the published interpretation of a member of the Commission that adopted the rule *and* to the Commission's previously enacted minority LPTV lottery preference (*see* pp. 18-30 supra). The Bureau agrees with May's interpretation of the minority LPTV lottery preference, and thus implicitly acknowledges that his advice to Trinity on the lottery preference was correct and credible. There is no sound reason why, if May's legal interpretation was credible then, it became "incredible" when the Commission later adopted the minority ownership exception.

facto control over a minority-owned licensee in which it held no cognizable interest. Silver King had been deeply involved in station construction decisions and activities, and its nonattributable interest by definition was an interest that did not permit Silver King even to influence (let alone control) the licensee's affairs. Nonetheless, because of the "various legal conclusions that can be drawn" from Silver King's activities -- in other words, because the law was not altogether clear -- the Commission found no basis for concluding that Silver King believed it had violated the law. Rather, said the Commission, "we perceive Silver King's legal arguments as a good faith belief that its participation in the construction of WTMW(TV) was [lawful]." 3 CR at 381 (¶75). The Commission also found that any inference of intent to deceive was negated by Silver King's disclosure of pertinent information in filings made with the Commission over the years. Id. (¶¶75-77).

Here, in contrast, the ID disqualifies Trinity for supposedly concealing a *de facto* control violation under ownership and minority incentive policies that *permitted* Paul Crouch to exercise influence or working control over NMTV since he held an attributable cognizable interest. Metromedia, Inc., supra. Moreover, whereas the Commission considered Silver King's legal arguments to be evidence of good faith, the ID in this case dismisses Trinity's legal interpretation as "unreasonable on its face" (and the Bureau brands it "incredible"). Finally, the ID here ignores the many Trinity disclosures of the kind found in Speer to negate any deceptive intent, disclosures that far exceeded any made by Silver King.

Because Trinity is similarly situated to Fox and Silver King in every material respect, there is no defensible ground for treating Trinity differently. Like Fox and Silver King, Trinity should have been absolved of intentional deceit *without* being forced into an unwarranted hearing. Since that is

now moot, the appropriate remaining redress is to vacate the issues. To continue this proceeding in light of Fox and Speer would be utterly arbitrary and capricious. Melody Music, Inc. v. FCC, supra.

IV. TRINITY SHOULD BE IMMEDIATELY EXONERATED

A. The Improvident Designation of Issues Must be Redressed

Both law and equity require that the improvident designation of the Trinity qualification issues be immediately redressed. *See* pp. 17-18 supra. The fundamental premise of the HDO -- that the *de facto* control policy applied to both the minority LPTV lottery preference and the minority ownership exception -- is demonstrably wrong. *See* pp. 18-40 supra. The Bureau acknowledges that the premise is wrong with respect to the minority LPTV lottery preference. *See* pp. 27-29 supra. The premise is equally wrong with respect to the minority ownership exception, because that policy was likewise based on beneficial ownership *regardless* of working control, and because cognizable parties to granted long-form applications are *ipso facto* authorized (indeed presumed) to exercise working control. *See* pp. 30-44 supra. To disregard those principles in the HDO was fundamental legal error. And wholly apart from that, it is inconceivable that the Commission would have designated these issues against Trinity if it had known that the Bureau itself, when processing and granting NMTV's application in 1987, had applied the minority ownership exception exactly the way Trinity and its counsel understood it. **Tab 1**, ¶4.

Moreover, as the Bureau recognizes, even if the HDO had reached reasoned and correct conclusions about the policies at issue, Trinity could not lawfully be penalized for a violation without clear advance notice of what the policies were. MMB Reply, pp. 3-4; *see* p. 29 supra. Adequate notice is a fundamental requirement of administrative due process. As the Court of Appeals has said:

> "It is beyond dispute that an applicant should not be placed in the position of going forward with an application without knowledge of requirements established by the Commission, and *elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected.*" Bamford v. FCC, 535 F. 2d 78, 82 (D.C. Cir. 1976) (emphasis added).

See also, General Electric Co. v. U.S.E.P.A., 53 F.3d 1324, 1328 (D.C. Cir. 1995) ("[d]ue process requires that parties receive fair notice" before being penalized); Rollins Environmental Services v. U.S.E.P.A., 937 F.2d 649, 652 n. 2 (D.C. Cir. 1991) ("[u]nder the due process clause of the Fifth Amendment, a regulation carrying penal sanctions must give 'fair warning of the conduct it prohibits or requires'"), and cases cited therein. Commissioner Ness has stated the principle eloquently in another context but in words that describe exactly what happened to Trinity here:

> "How can anyone defend an approach where broadcasters are told, 'You must air some educational programming, but we won't tell you how much. *Your license renewal is on the line, but we won't tell you what standards we'll apply.'?*"[25]

The Bureau concedes that the meaning of "minority-controlled" under the minority LPTV lottery preference was not clarified until the HDO, and that Trinity thus did not receive the legally required clear advance notice. *See* p. 29 supra. Yet even the "clarification" supposedly made by the HDO, which carried no legal effect in any event (*see* p. 30 n. 14 supra), has left the ALJ and the Bureau hopelessly at odds with one another in interpreting what the standard was when adopted. The Bureau (correctly) says that the minority LPTV lottery preference was available to applicants whose "beneficial minority ownership" exceeded 50% and that "working control" was irrelevant. The ALJ adamantly disagrees. *Compare* MMB F&C ¶33, p. 27 supra, *with* ID at n. 43. As the Court of Appeals has stressed, regulations do not give adequate notice "when different divisions of the

---

[25] Remarks of Commissioner Susan Ness, Federal Communications Commission, Before the West Virginia Broadcasters Association, March 18, 1996, FCC News Release, March 22, 1996, p. 3 (emphasis added).

enforcing agency disagree about their meaning." General Electric Co., supra, 53 F.3d at 1332. Where, as here, "the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished." Id. at 1328-29, 1334. *See also,* Rollins Environmental Services, supra, 937 F.2d at 653, 654 (when the agency itself is uncertain of the meaning of its own rule and agency personnel construe the rule differently, it is arbitrary to find the rule clear, and no penalty should be imposed).

The same analysis applies to the minority ownership exception. There too "minority control" was based on beneficial ownership. *See* pp. 30-40 supra. Indeed, the very definition in the rule ("more than 50 percent owned" by minorities) said just that. *See* p. 35 supra. Moreover, that was the *same* definition the Commission was using for the LPTV lottery preference, which indisputably turned on beneficial ownership alone. *See* pp. 24-26 supra. Thus, to the extent that there was clear notice of what "minority-controlled" meant for purposes of the minority ownership exception, it was notice that *beneficial ownership*, not working control, was the standard.

Even if the HDO is viewed as an effort to clarify or revise that definition, that effort was legally ineffective. The HDO neither acknowledged nor justified making such clarification or change. Such clarification or change would have violated the mandate of Congress. And no such change could have been made without formal rule making. *See* p. 30 n. 14 supra. Furthermore, as with the minority LPTV lottery preference, the agency has exhibited internal confusion as to the meaning of "minority-controlled" -- confusion that is evident in the clash between (a) the Patrick/Fowler position (also the Bureau position in 1987) that operating control is *irrelevant*, and (b) the Bureau position

today that operating control is *dispositive*. An agency rule that confuses the agency itself is hardly clear notice to anyone else. General Electric Co., Rollins Environmental Services, supra.[26]

Where the Commission finds that a hearing was improvidently designated, it will delete the issues or otherwise exonerate the applicant and terminate further proceeding. *See* pp. 17-18 supra. Justice and elementary fairness require such action here. It is now clear beyond reasonable dispute that the HDO was premised on fundamental legal error. As the price for the Commission's error, Trinity has spent more than three grueling and costly years defending itself in unwarranted hearings against unfounded but very serious charges. Its integrity has been unjustly impugned; its reputation as a major religious organization in this country has been unfairly tarnished; and opportunistic scavengers have closed in on its television license renewals, sensing an undeserved windfall at Trinity's expense. In the name of simply doing what is right to redress a fundamental wrong, the Commission must put a stop to this injustice now.

B. Trinity's Understanding of the Law Was Reasonable and Based on Good Faith

Even if the Commission *still* believes that Trinity incorrectly interpreted the law, there can no longer be any dispute that its interpretation was, if not correct, certainly reasonable. With respect to the minority LPTV lottery preference, the Bureau itself, which is responsible for administering the LPTV lottery rule, asserts that Trinity's interpretation of "minority-controlled" was correct. That the Bureau shares Trinity's interpretation establishes *ipso facto* that Trinity's interpretation was

---

[26] The 1990 Metro decision on which the HDO relies did not even remotely give clear notice of the regulatory requirements Trinity is now charged with violating. First, Metro was not decided until years *after* Trinity and NMTV had already acted in reliance on Colby May's advice that NMTV legitimately qualified as a minority-controlled entity under the Commission's policies. Second, Metro involved neither of the two minority policies at issue here. And third, to the extent that Metro's discussion of minority ownership policies relates to the policies in this case, it *supports* Trinity's interpretation. *See* pp. 45-47 supra.

reasonable. In turn, that removes any ground for concluding that Trinity and its counsel did not believe that NMTV was a minority-controlled entity entitled to claim a minority preference in the LPTV lottery. As the Commission held in Fox Reconsideration, supra, bad faith cannot be found unless the licensee "knew about" legal authorities that contradicted its position and "interpreted or should have interpreted them the same way." 3 CR at 532 (¶30). The Commission will not find that the licensee "should have" interpreted the law the same way the Commission ultimately did unless the legal authorities at the time "would *necessarily* have led" to such interpretation. Id. (¶31) (emphasis added). If "a reasonable applicant . . . would not necessarily have realized" that its interpretation was incorrect, good faith is established. Id. This supports Trinity's position -- based on the uncontradicted testimony of Colby May and Paul Crouch -- that they genuinely believed that NMTV was a *bona fide* minority organization that qualified for the lottery preference. There is no basis for finding otherwise.

Trinity likewise must be found to have acted in good faith with respect to its interpretation of the minority ownership exception. As May consistently explained, he understood the definition of "minority-controlled" in the ownership rules to follow directly from the definition of that term in the previously-adopted lottery preference. *See* pp. 71-75 infra. That interpretation was eminently reasonable, since the definitions were identical. Moreover, as shown by the legislative and administrative history detailed above, Congress mandated the beneficial ownership standard for both the lottery preference *and* the minority ownership exception, and the Commission adopted it for both. The most compelling point of all, however, is Commissioner Patrick's statement, which articulated exactly the same interpretation of the "minority-controlled" rule that May understood -- an interpretation that we now know from the videotape was expressly shared by Chairman Fowler, and

that we also know from the Glasser affidavit was applied by the Bureau when it processed NMTV's Odessa application in 1987. Commissioner Patrick's statement alone -- the contemporaneous published interpretation of a member of the Commission that adopted the rule -- establishes *ipso facto* that May's interpretation was reasonable even if it is now ruled not to have been the correct interpretation. And for the reasons stated above, because the interpretation was at the very least reasonable, there is simply no basis for concluding that May and Trinity were not proceeding in good faith under the minority ownership exception *as well as* under the minority lottery preference.[27]

In sum, even if the Commission cannot conclude that Trinity's interpretation of the law is correct, the Commission still should find that Trinity had no intent to violate rules or abuse Commission processes, and no intent to withhold from the Commission information that was not relevant under the rule as Trinity understood it.

C. The Bureau's New Contention Is Wrong

There is no merit whatsoever to the Bureau's new contention that Trinity was *not* proceeding in good faith. After twice arguing to the ALJ that Trinity deserves a license renewal, the Bureau offers in its final appellate pleading a revised theory of the evidence to explain why it now urges Trinity's disqualification. This appellate reversal is unsupported by the record. A review of both the record and the Bureau's shifting positions in this proceeding shows why.

---

[27] The Bureau's argument to the contrary based on an obvious misreading of May's testimony is answered at pp. 66-76 infra.

1. The Shift of the Bureau's Position

a. Proposed Findings

Throughout the proceeding, the Bureau was meticulous and thorough in the trial of the Trinity issues. It asked for thousands of pages of documents, attended depositions in California, submitted more than 400 hearing exhibits, and extensively cross-examined Trinity's witnesses. By the end of the hearing, the Bureau had vigorously litigated the issues against Trinity and was completely familiar with the record.

Even though it had aggressively prosecuted the Trinity issues, the Bureau (correctly) determined after reviewing the record that disqualification of Trinity is not justified. Recognizing that the HDO had legally erred, the Bureau in its proposed findings acknowledged that the minority LPTV lottery preference turned not on working control but on beneficial ownership, and found therefore that NMTV had not abused process in claiming the lottery preference. MMB F&C ¶¶ 33, 304, 305; *see* pp. 27-29 supra. This was fair and legally correct. As to the minority ownership exception, on the other hand, the Bureau accepted the HDO's erroneous premise that *de facto* control applied, found that Trinity did control NMTV, and urged the maximum forfeiture for that violation. However, said the Bureau, the relationship between NMTV and Trinity resulted from Colby May's legal interpretation of the minority ownership exception, and Trinity had no intent to conceal it from the Commission. The Bureau proposed that the ALJ make the following finding from May's testimony:

> "In rendering his advice, May did not concern himself with how TTI had actually operated or whether TBN and/or Crouch actually controlled TTI." MMB F&C ¶55.

The Bureau thus recommended the following conclusions:

> "[T]he evidence does not support a conclusion that Crouch, TBN, or NMTV intended to deceive the Commission. The filing of NMTV's applications for consent to the

assignment of the Odessa, Portland, and Wilmington authorizations was the product of religious zeal and a novel and bizarre legal theory. This legal theory was not fully explained to the Commission until the filing of NMTV's Request for Declaratory Ruling in November 1991, nearly five years after NMTV sought its first full power television authorization and after Borowicz filed his petition to deny NMTV's Wilmington application.

"Considering all the circumstances, it must be concluded that the wrongdoing of Crouch, TBN, and NMTV does not warrant denial of TBF's license renewal application. Crouch and TBN are now in compliance with the multiple ownership rules, and there is no reason to believe that denial of TBF's application is necessary to ensure the future reliability of Crouch and TBN or the truthfulness of their submissions." MMB F&C ¶¶310-311.

To support its finding that May did not consider *de facto* control when advising Trinity, the Bureau cited four different parts of his testimony. MMB F&C ¶55. (May's *full* testimony must be quoted below, because the Bureau's later change of position was based on a fragment of testimony that the Bureau took out of context and distorted.) At the Bureau's first citation (Tr. 3220-25), May testified that in advising Trinity he understood the definition of control in the minority ownership exception to be an exception to the definition of control in Note 1 and that, in the context of the minority ownership exception, working control for a nonprofit public charity meant having a functioning Board of Directors. Specifically, May testified:

"The control question is determined in the case of this nonprofit public charity based on the Directors of the company, and those Directors dispensing their responsibilities in generally directing the affairs of the ... company, and that's working control in whatever manner [exercised]." Tr. 3220.

* * *

"I've been involved in cases in which the issue of nonprofit companies and their ability to get credits under Commission policies have been at issue and directors are determined to be owners. And for purposes of applying the Commission's policies, that satisfies the criteria ... for ownership and control." Tr. 3221.

* * *

"I have to live with the years that have gone by since I rendered the advice. But the rule as it was stated at that time doesn't even use the word 'control' for purposes of deciding what you do when you mean minority control. It says: means more than 50 percent owned. It doesn't say the word ... owned and controlled." Tr. 3222.

* * *

"Minority control means more than 50 percent owned by one or more members of a minority group. So, the idea that no one talks about control generally, I mean, in my mind control and ownership are essentially and functionally, in the case of this nonprofit, the same thing. And as ... long as you meet the idea of minority control being 50 percent owned by one or more members of a minority group, that's the basis upon which I was rendering advice and upon which people certainly undertook a lot of activity, for which I sit here today." Tr. 3222-23.

* * *

"[W]hat I'm saying is that this is a brand new policy. For 66 years the Commission hasn't had a minority policy in ... trying to develop mechanisms in which you can engage minorities to do the kind of things that these people began about doing. So, there wasn't precedent that applied to that. This is a new policy that says: *we are creating an exception.* We are creating an *exception* if you do these particular things or these things apply. And that's precisely what I tried to render my advice on." Tr. 3223-24 (emphasis added).

* * *

"Okay. So, that case predates this case. I mean, that case isn't otherwise relevant in this context of applying this *exception* as it was newly initiated and enunciated by the Commission. I mean ... they are essentially creating an *exception*. And if you have an *exception*, you have an *exception*. And it says we will permit group owners to be able to participate and have cognizable interests in minority companies as long as the minority companies meet these specific criteria, and that criteria is that they be minority-owned and in that context ... it defines minority control as being owned, and in that sense I'm understanding 'owned and controlled' to be the same thing." Tr. 3225 (emphasis added).

At the Bureau's second citation (Tr. 3228-30), May was asked if he thought Paul Crouch could exercise *de facto* control over NMTV and responded that he believed the minority ownership exception permitting Crouch to hold the cognizable positions of President and Director was an exception to *de facto* control considerations. Specifically, May testified:

> "No. He ... has to conduct himself as the President and the Director of the company. But the things that he is entitle[d] and enabled and empowered to do as Director and Officer of the company are the things that you're here today telling me mean that this is a de facto control situation. And what I've tried to make as clear as I possibly can is that *I didn't consider the de facto questions based on what I read and what I advised these people,* because I thought there was effectively an *exception* under which they would allow a very close 'cognizable' interest to exist between the two. And, so, then based on that I gave the advice I did and set in motion all the affairs that I ... suppose bring us here today." Tr. 3229 (emphasis added).

At the Bureau's third citation, May was asked why he did not consider the relationships between Trinity and NMTV when he advised that NMTV was eligible under the minority ownership exception. He answered:

> "I never really gave a thought of that in that context, that they were ministerial functions and that the requirements and the specifications under the rule of fourteen went to the issue of the Board of Directors for a non-profit company and who they were ... if they were, in fact, directors then I believed that they met the exception under the rule and it was appropriate to proceed accordingly." Tr. 3377.

In other words, May believed that under the minority ownership exception "ownership equaled control." Id.

In the Bureau's fourth citation, May reiterated that a *de facto* control question was "not one that I considered in the context of evaluating this rule, advising my client, and setting this in motion." Tr. 3611.

b. Reply Findings

Notwithstanding vigorous arguments by Glendale and SALAD that Trinity had sought to deceive the Commission, the Bureau steadfastly maintained its position that there was no intent to deceive. In its reply findings the Bureau said the following about Trinity's intent:

> "The Bureau agrees with Trinity that NMTV's failure to disclose the nature and extent of its relationship in its applications, when considered with contemporaneous disclosures in other submissions to the Commission, indicates that NMTV's omissions

did not occur because of an intent to deceive the Commission....Thus, the Bureau believes that loss of TBF's license is *not* the appropriate sanction." MMB Rep F&C ¶35 (emphasis in original).

The "contemporaneous disclosures" on which the Bureau relied had been recited in Trinity's proposed findings. There Trinity had described numerous disclosures to the Commission that belied an intent to conceal the relationship between Trinity and NMTV. The disclosures included: May's discussions with Glasser reporting that Trinity would provide the financing and programming for NMTV's Odessa station and that NMTV Director Jane Duff was a Trinity employee; the NMTV Bylaws reciting Crouch's authority as President to "supervise, direct, and control" the operation of the business; and a great many filings showing that Duff was Crouch's Administrative Assistant employed at Trinity's headquarters, that Trinity's Engineering Vice President performed engineering work for NMTV and prepared and signed applications that NMTV filed with the Commission, that the President and Assistant Secretaries of NMTV held the same positions with TBN, and that Trinity and NMTV used the same legal and engineering consultants. Trinity F&C ¶¶66, 198, 203, 259-60, 667-68. Trinity cited authorities for the principle that no one who believed that the relationship between Trinity and NMTV was improper and was scheming to conceal it would have made so many disclosures regarding that relationship. Id. ¶668. The Bureau agreed.

In sum, after actively participating at the hearing, thoroughly reviewing the record to prepare proposed findings, and evaluating the extensive submissions by Trinity's opponents, the Bureau concluded that for two reasons Trinity did *not* intend to deceive the Commission: (a) Trinity's conduct resulted from May's belief and advice that the minority ownership exception was an exception to the

de facto control policy; and (b) the contemporaneous disclosures made to the Commission belied intentional concealment.[28]

c. Exceptions

A year later, the ALJ issued his decision finding that Trinity did intend to deceive the Commission and should be disqualified. The ALJ based this on three main conclusions: (a) the *de facto* control policy applied to both the minority LPTV lottery preference and the minority ownership exception (ID ¶¶326-28); (b) Crouch himself knew that the *de facto* control policy applied and did not rely on May's advice (ID ¶332); and (c) Crouch thus believed that NMTV was a sham (id.). The ALJ rejected the Bureau's position that *de facto* control did *not* apply to the minority LPTV lottery preference (*see* p. 27 supra), and he ignored completely the contemporaneous disclosures that the Bureau said negated a finding of intent to deceive (*see* pp. 63-64 supra).

The Bureau's exceptions to the ID dealt almost exclusively with Glendale's unfitness to be a licensee but included one sentence about Trinity. It read:

> "The ID's denial of Trinity's renewal application was supported by substantial record evidence, and, consequently, the ID should be affirmed insofar as Trinity is concerned." MMB Exceptions, pp. 1-2.

Thus, in a single sentence that offered no specifics and cited the wrong legal standard, the Bureau scrapped the well-considered position it had twice urged the Commission to adopt. It did not claim that denial of Trinity's application was supported by the *preponderance* of the evidence -- the *correct*

---

[28] The Bureau reached these conclusions without addressing the statement of Commissioner Patrick that presaged May's understanding of the minority ownership exception. Had the Bureau confronted Patrick's statement, it could not have characterized May's interpretation as "novel and bizarre" (*see* p. 61 supra), since Patrick's statement proved *ipso facto* that May's interpretation was neither "novel" nor "bizarre." Patrick's statement (had the Bureau addressed it) would have provided strong additional support for the Bureau's conclusion that Trinity's license should be renewed.

standard for review of an initial decision.[29] And it failed to identify the "substantial evidence" that supposedly justified its new position. It likewise failed to explain why the contemporaneous disclosures by Trinity and NMTV no longer refuted an intent to deceive, why Trinity's reliance on the advice of its counsel no longer exonerated Trinity, and why those grounds previously advanced by the Bureau (along with other supporting evidence like Commissioner Patrick's statement) did not outweigh any adverse inferences and warrant Trinity's renewal. Since the Bureau offered no substantive explanation for its switch, Trinity was unable to respond on the merits. All Trinity could do to challenge the Bureau's abrupt reversal was point out that the Bureau had applied the wrong standard of review. Trinity Reply Exceptions, pp. 1-4.

d. Reply Exceptions

When the Bureau filed its final appellate pleading, it took yet another position. It now argued for the *first time* in the three year history of the case that disqualification of Trinity was supported not just by "substantial evidence" but by "the weight of the evidence." MMB Reply, p. 14. Moreover, for the first time the Bureau stated its rationale for recommending non-renewal -- a *new* theory that was *different* from any ground on which the ALJ had ruled.

The ALJ disqualified Trinity because he perceived misconduct by Crouch himself. In the ALJ's view, it was not a question of reliance on counsel. Rather, said the ALJ, Crouch knew that *de facto* control *did* apply and he deliberately created NMTV as a sham to deceive the Commission. The ALJ stated no conclusion that Colby May exhibited a lack of candor that should be attributed to

---

[29] Abacus Broadcasting Corp., 8 FCC Rcd 5110, 5116 (Rev. Bd. 1993) (Commission decision must be based on "a preponderance of the record evidence"); Sea Island Broadcasting Corporation of S.C., 69 FCC 2d 1796, 1797 (1978) (customary standard in Commission review of initial decision is "preponderance of the evidence").